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No. 49

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

VIRGINIA ELECTRIC AND POWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys,
Department of Justice, Washington 25, D.C.

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OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals (R. 329–338) is reported at 270 F. 2d 707. Earlier opinions in this case are reported at 218 F. 2d 524, judgment vacated and case remanded, 350 U.S. 956, O.T. 1955, No. 41; and at 235 F. 2d 327, rehearing denied, 237 F. 2d 165 (R. 75–83).

JURISDICTION

The judgment of the court of appeals was entered October 5, 1959 (R. 338). On December 30, 1959, the time within which to petition for a writ of certiorari was extended, by order of Mr. Justice Black, to March 3, 1960 (R. 339). The petition for a writ of certiorari

was filed on that date and certiorari was granted on April 18, 1960, 362 U.S. 947. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Act of December 22, 1944, c. 665, 58 Stat. 887–888, 891–892, 894, provides in pertinent part:

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.
>
> * * * * *
>
> SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view towards providing an adequate reser-

voir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein * * *.

* * * * *

ROANOKE RIVER BASIN

The general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session, is approved and the construction of the Buggs Island Reservoir [name changed to "John H. Kerr Dam and Reservoir," 65 Stat. 616, 617] on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000.

QUESTIONS PRESENTED

1. Whether the United States is required to pay a power company, as compensation for the frustration by condemnation of a flowage easement owned by the power company over land riparian to an interstate navigable stream, the value of the subservient land for agricultural or forestry uses.

2. Whether such compensation must also include so-called severance damage to the remaining part of the tract not embraced in the power company's easement.

STATEMENT

This is a sequel to the case of the same name before this Court in No. 41, October Term, 1955, in which certiorari was granted, the judgment was vacated, and the case was remanded to the court of appeals for further consideration in the light of *United States* v. *Twin City Power Co.*, 350 U.S. 222. *United States* v. *Virginia Electric & Power Co.*, 350 U.S. 956. The facts of the case in its current posture may be summarized as follows:

The Dan River, the principal tributary of the Roanoke River, is a navigable stream. In 1944, Congress, declaring its intention "to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized", approved projects in various areas of the country, including a general plan for the comprehensive development of the Roanoke River Basin as "recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session." Act of December 22, 1944, 58 Stat. 887, 888, 894 (*supra*, pp. 2–3). By the same Act and in implementation of the plan, Congress authorized "the construction of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina [now known as John H. Kerr Dam and Reservoir]", the project here involved. As stated in House Document No. 650, 78th Cong., 2d Sess., the specific navigation purposes of the project are "regulation of stream flow" and "assur[ing] the necessary minimum low flows" for completion of the channel between Palmyra Landing and Weldon in North

Carolina (pp. 8–9, 76–77).[1] The other principal objectives are flood control and power production (pp. 8–9, 80–81).

Proceedings to acquire the lands needed for this project included a suit instituted in the United States District Court for the Western District of Virginia, in which the United States proceeded, *inter alia,* to impose by condemnation a flowage easement over the tract now involved, riparian to the Dan River (R. 1–8). The issue was how much compensation was owed for the imposition of that flowage easement and to whom it should be paid, no question as to right to condemn being presented.

The United States initially proposed to condemn the fee title of this particular tract, which is part of a large (7,400 acre) estate (called the Falkland Estate). However, at the urgent request of the fee owner, the estate to be taken was reduced to a flowage easement, leaving the owner both with subsurface rights and control of the shore, subject to federal access for operational purposes (R. 158–165). In exchange, the fee owner (Mrs. Olive Vaughan Williams) offered an "Option for Purchase of Flowage Easement", with detailed stipulations accepted on behalf of the United States, in which she settled her

[1] It is believed unnecessary to deal further with the interstate, navigable nature of the Dan River since opinions of the court of appeals assume navigability of the river (R. 76, 79, 330–331) and respondent has not argued otherwise. See S. Rep. No. 83, 80th Cong., 1st Sess. (1947), p. 1, stating categorically that the "Dan River is an interstate water, being navigable in North Carolina and Virginia"; H. Doc. No. 65, 74th Cong., 1st Sess. (1935), p. 25.

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claims arising out of the taking of the flowage easement. The instrument recited that it was "[i]n consideration of One Dollar ($1.00) and other valuable considerations" and released "all damages and claims whatsoever" (R. 58–67).

The respondent Power Company held a long-dormant flowage easement over the tract. The 1,840-acre tract (FF–3100E) is comprised of six parcels. Parcel A, containing 1,762.8 acres, lies immediately adjacent to the Dan River (R. 4–6). Parcels B, C and D, containing 44.4, 21.2 and 7.2 acres, respectively, are islands in the bed of the Dan River (R. 6–7). Parcels E and F are small parcels 3.6 acres and 0.8 of an acre, respectively, not immediately adjacent to the river (R. 7–8). Respondent's interests in the parcels of land of which Tract FF–3100E is a part were described in a statement of facts agreed upon at pretrial conference as (R. 69):

> Water rights, water power and water privileges, including the right to construct and maintain a dam or dams or other works on said lands and to raise the water at the head of Hyco Falls in the Dan River six feet above the usual water level without compensation for damages caused thereby.

The Government's settlement with Mrs. Williams was expressly subject to "such water, flowage, riparian and other rights, if any" of the Power Company (R. 63). Thus, the sole question litigated in these proceedings was the compensation, if any, owing to the Power Company.

Like the claims asserted by the Twin City Power Company in then pending condemnation cases, the

Virginia Electric and Power Company here claimed substantial compensation for its rights "due to the location of the land involved and its availability, at the time of the taking and in the reasonably near future, for water power development purposes" (R. 22). Unlike the *Twin City* cases, the alleged value of the respondent Power Company's flowage right was thought to be, in the words of the trial court, "the fee simple value of the land" (R. 45; see also R. 35). When the Twin City claim was rejected by this Court, *United States* v. *Twin City Power Co.*, 350 U.S. 222, the Court remanded this case for re-examination in the light of that decision. *United States* v. *Virginia Electric & Power Co.*, 350 U.S. 956 (R. 77).

Thereafter, the court of appeals, following argument, vacated the judgment of the district court and remanded the case. Its opinions on remand recognize that availability of the land as a site for water power development could not be considered, but hold that this Court's decision did not exclude compensation for other elements of value, such as value for agricultural or grazing purposes (R. 78–83).

On remand, the district court overruled a demand by the United States for a jury trial and appointed commissioners to determine the award to be made to the respondent (R. 84–89). The commissioners were instructed, *inter alia* (R. 90–91): "In making your determination of fair market value, you should disregard the fact that Virginia Electric and Power Company has a perpetual flowage easement over some of the land involved in this case and that the owner of the fee, Olive Vaughan Williams, and the

United States made an option contract dated April 30, 1951, and you are further instructed that you should not attempt to determine the value of the respective interests of the owner of the fee or of such flowage easement." The district court adopted the commissioners' answer to one of the inquiries propounded to them and awarded respondent $65,520, an amount somewhat greater than the previous award of $61,600, which had been based upon the fee simple value of the land over which the Power Company claimed flowage rights (R. 145–149). The *"res"* valued was the difference between the value of the Falkland Estate (of some 7400 acres) free of servitude and the value of such estate when subjected to a flowage easement embracing some 1540 acres.[2]

The evidence of value upon which the award was based consisted of testimony offered by respondent as to the value of the 1540 acres for agricultural and

[2] The "Second" inquiry posed to the commissioners, which the district court adopted as the proper measure of value in this case, is (R. 145, 149): "Second: What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, assuming for the purpose of this inquiry that said easement is over the land in Tract FF–3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?"

Counsel for the United States made clear its objections to the inquiries and instructions propounded to the commissioners (R. 155, 156–157). A motion to clarify the record in this respect had also been filed (R. 95–98). The Government additionally submitted requested instructions to the commissioners which were denied by the district court (R. 91–95, 98).

grazing purposes. Respondent offered no evidence of its ability to make any use of the flowage easements.

Included in the total award of $65,520 was the sum of $11,720, representing so-called severance damage to the residue of the tract, *i.e.*, to the portion which would not be subjected to flooding (R. 147). A motion to exclude this item from the award was overruled by the district court (R. 139–142, 149).

On appeal, the entire award was sustained.

SUMMARY OF ARGUMENT

I

Compensation has been awarded respondent power company on the theory that the United States, in taking a flowage easement from the fee owner, has deprived respondent of the value of its outstanding flowage easements. In measuring that value, the courts below have awarded respondent compensation on the basis of the estimated worth (for agricultural and grazing purposes) of the servient land, *i.e.*, the acreage which is subject to the easements.

The value of respondent's easements cannot be equated, however, with the value of the servient fee. An easement is not an estate or possessory interest, but merely a right to make a limited use of land which is in the possession of another. A single tract of land may be subject to numerous easements and yet retain great value.

Far from being equivalent to fee value, the easements of the power company have no more than nominal value. This is so because the prospect of putting those easements to use was never more than

remote and because that prospect was at all times conditioned upon the prior grant of a federal license.

Respondent's easements had been dormant for many decades and respondent had never gone so far as to assemble the lands requisite for an integrated dam site. Moreover, the limited prospect that the easements might, some day, prove productive had terminated well in advance of the condemnation proceedings. It disappeared, at the latest, when Congress determined that a federal power project would be built at the site.

Respondent is in fact seeking compensation for the frustration of a business hope and expectancy—the expectancy that it might be licensed to place a dam in the navigable river. There is no claim here that the flowage easements had any possible utility save in conjunction with a power project. Both *United States* v. *Twin City Power Co.*, 350 U.S. 222, and *United States* v. *Grand River Dam Authority*, 363 U.S. 229, establish the proposition that when the United States, in the exercise of its commerce power, undertakes a project, it need not pay compensation because the decision to exercise federal prerogatives frustrates the business opportunities of others.

Respondent has offered no proof showing that a willing buyer would have paid anything for flowage easements in the face of the Government's preemption of the opportunity to build a dam and flood the acreage in question. Instead, respondent has offered evidence as to what the land is worth to someone else—to the fee owner. The supposition, accepted by the courts below, that the fee owner, "having con-

veyed the flowage rights to the power company * * * thereby destroyed the value of the fee," is untenable. For many decades since the power company obtained its easements, the land has been put to productive use by the fee owner alone. The easements, on the other hand, had never been put to the only use which they in terms permit. Nor does the supposition take account of the consideration, confirmed by events, that the easements might never become viable because a license might never be issued.

The court of appeals' approach is not only untenable because of the contingencies and conditions to which exercise of the easement rights was subject; it is also open to the objection that it would appraise the power company's property interest on the "illegitimate" basis of its capacity "to injure or hinder another" (*Consolidated Gas Company* v. *City of New York*, 157 Fed. 849, 874 (C.C.S.D.N.Y.)), rather than by reference to the affirmative use to which that interest might be put by the holder. See *Roberts* v. *New York City*, 295 U.S. 264, 283. It is well settled, moreover, that the grantee of an easement can complain of interference by subsequent grantees of the fee owner only if he can establish that they are in fact impairing his active enjoyment of his right of use.

The court below was apparently of the view that if fee value were not awarded to the power company, the United States would get "something for nothing." The Government is not seeking a windfall but is seeking, rather, to avoid two possibilities of which it is apprehensive as a result of this decision—that of

paying the wrong person and that of being required to pay twice.

A corollary of the proposition that respondent's rights were not productive or valuable and had in practical effect expired before the date of condemnation is the proposition that the value of the servient fee stood substantially unimpaired by the outstanding easements at the time of the federal taking. At most, the power company easements were a cloud on title. To the limited extent that this cloud may have diminished the market value of the fee, the diminution is one for which the private parties involved, and not the United States, are responsible. *Boston Chamber of Commerce* v. *Boston,* 217 U.S. 189, 195.

Our view, in short, is that the fee owner is entitled to the fee value. The fortuitous circumstance that the fee owner in this case desired to convey a flowage easement, rather than a fee, to the United States and that she deemed one dollar adequate monetary consideration because she wished to enjoy the benefits of having an artificial lake upon her estate, cannot enlarge the rights of others or confer upon them a right to compensation for legal interests which are not theirs. *United States* v. *Petty Motor Co.;* 327 U.S. 372, 376.

II

The court below has approved an award which included an item of $11,720 for so-called "severance damages." But since the tract of land which will remain unflooded by the federal project is one in which the power company has no interest of any kind or description, this element of the award is entirely

without basis. Moreover, the severance damage rule is applicable only where there is a tract in one ownership and there is a unity of use as between the part taken and the remainder.

ARGUMENT

I. THE RIGHT OF USE REPRESENTED BY RESPONDENT'S EASEMENTS HAD NO SUBSTANTIAL VALUE BECAUSE PROSPECT OF ENJOYMENT WAS NEVER MORE THAN REMOTE AND WAS IN ALL EVENTS CONDITIONAL UPON THE PRIOR GRANT OF A FEDERAL LICENSE. THE UNITED STATES MAY NOT BE REQUIRED TO PAY COMPENSATION BECAUSE THE EXERCISE OF ITS PREROGATIVES HAS FRUSTRATED RESPONDENT'S EXPECTANCIES.

Respondent's right to compensation in this case depends upon a determination as to the nature of the interest of which it has been allegedly deprived. The court below has accorded compensation *as if* the interest of respondent were the equivalent in value of a fee interest. Thus, the compensation awarded is based upon the estimated value of the 1540 acres in question for agricultural and grazing purposes.

It is undisputed, however, that respondent owned no interest in fee; rather, it was the possessor of long-dormant easements. An easement is not an estate in land, or, indeed, a possessory interest at all. It is a right to make a limited use of land which is in the possession of another. American Law Institute, *Restatement of Property,* Sec. 450. The value of that interest is necessarily circumscribed by the capacity of the easement holder to engage in the activity which the easement describes. It is not only possible, but commonplace, for a single tract of land to be subject to a variety of uses, both by those who

own possessory interests and by numerous easement holders. See *Chicago, Burlington and Quincy Railroad Co.* v. *Chicago*, 166 U.S. 226; *Northern Pac. Ry. Co.* v. *North American Tel. Co.*, 230 Fed. 347 (C.A. 8).[1]

The right which respondent obtained by virtue of its easements was a right to build a dam (subject, of course, to the requisite grant of authority from the United States) at a specified point on the navigable Dan River and to flood a designated portion of the riparian land in conjunction with the operation of such a dam. The parties to this case have agreed (R. 69) that the rights embraced by respondent's easements were as follows:

> Water rights, water power and water privileges, including the right to construct and maintain a dam or dams or other works on said lands and to raise the water at the head of Hyco Falls in the Dan River six feet above the usual water level without compensation for damages caused thereby.

To establish that an easement has more than nominal compensable value, one must show that the use which is being impaired or foreclosed was an actual or probable use, not one merely remote or speculative. *Chicago, Burlington* case, *supra*. One must show further that exercise of this right of use was not conditional upon the "taker's" permission or license. Respondent cannot meet these requirements.

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[1] There is nothing to prevent an owner of land from granting similar easements to a number of persons. See *infra*, p. 20.

A. That there was no reasonable probability that respondent's easements would be put to actual use is, of course, strongly suggested by the fact that they had been dormant for many decades. There is, however, a more fundamental consideration. To put the easements to the only use which they permitted would necessarily require a federal license. There is no claim by respondent that it might have flooded the land in question—or, indeed, that it would have had any means of doing so—other than by harnessing the waters of the navigable Dan River. In a word, the prospect of flooding the land depended entirely upon grant of a federal permit authorizing respondent to place works in the river. That prospect had expired well before this action in condemnation was instituted. It disappeared, at the latest, when Congress determined that a project at the location in question should be built by the United States.

To state the matter another way, what respondent actually seeks—though in deference to this Court's decision in *United States* v. *Twin City Power Co.*, 350 U.S. 222, it avoids the formulation—is value for its interest in land predicated upon the utility of that property interest in conjunction with a power project.

To be sure, it was the United States which frustrated any prospect that respondent might have had of building a dam at the site. But, as this Court made clear in the *Twin City* case and even more recently in *United States* v. *Grand River Dam Authority*, 363 U.S. 229, when the United States, in the exer-

cise of the commerce power, undertakes a project, "it is exercising established prerogatives and is beholden to no one" (363 U.S. at 233); it need not pay compensation because the decision to exercise those prerogatives frustrates hopes, expectancies or business opportunities. *Id.*, p. 236.

B. The infirmity of respondent's position is also demonstrated by the fact that it has obtained compensation on the theory that the value of its easement was measurable by the agricultural or grazing value of the servient land, albeit the only right conferred by the deeds upon which it relies is a right to flood the land in the event that it builds a dam in the adjacent river. Refraining from offering to prove that this right was viable or productive, respondent shows what the servient land was worth to someone else—the owner in fee. Plainly, a willing buyer would buy an easement for a sum approximating fee value only if it appeared that the seller could convey an unrestricted and unconditional right of use which, for all practical purposes, would exclude all other uses. Yet, it appears that respondent's right of use was never more than conditional and speculative. Apart from the fact that it had never assembled the land necessary for an integrated power site (R. 17, 20), its hopes of building a power project had completely expired before the date of the condemnation proceeding. Accordingly, it is not surprising that respondent offered

no evidence as to the price at which it might have sold its "right" to flood the acreage.[4]

The court below seriously errs when it suggests that the owner of the fee, "having conveyed the flowage rights to the power company * * *, thereby destroyed the value of the fee" (R. 330).[5] This suggestion can hardly be squared with the fact that, for many decades since the conveyance of the easements, the fee owner alone has put the property to productive use.[6] Nor does it take account of the consideration, confirmed

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[4] It is evident that a purchaser, knowing that the Federal Government was planning to exercise its overriding authority, would simply be buying a lawsuit.

[5] The notion embodied in the opinion of the court below that the United States could have obtained all it needed from the power company is erroneous. The deeds involved are clear that the easement to the power company was for the possible building of dams, power houses, etc. "in the development of the water power aforesaid of the Dan River" (R. 174–175). The flowage easement acquired by the United States was for the much broader purposes of "a flood control project and for other public uses incident thereto" (R. 3, 9), including "substantial benefit to navigation." 58 Stat. 887, 888.

[6] A ready illustration of the substantial value which the fee owner, Mrs. Williams, had in the tract involved is the fact that she sold timber from the tract (R. 90). The growth of timber was considered by respondent's witness Raleigh M. Felton to be the highest and best use of the property (R. 133). Indeed, he considered the land involved as "primarily a timber tract" (*ibid.*). The fact that Mrs. Williams had rights to the substantial value represented by the forestry use is also emphasized by respondent's Exhibit C (R. 172–177). The deed there set forth grants a right, *in connection with any power development*, to cut and remove trees as necessary for a right of way for transmission and telephone lines, but any acreage so used for such lines must be paid for independently of any consideration recited in the deed (R. 174–175).

by events, that respondent might never obtain the license upon which the capacity to bring water upon the land depended.

Moreover, the value of an interest in land must always be determined by reference to the affirmative use to which that interest may be put. The view that property has value "because it may be used to injure or hinder another enterprise, although itself conferring or securing nothing of value," was rejected, many years ago, as being "so obviously illegitimate as to require no discussion." *Consolidated Gas Co.* v. *City of New York*, 157 Fed. 849, 874 (C.C.S.D.N.Y.). This Court thereafter noted that the "nuisance value" theory discussed in the *Consolidated Gas Company* case had been "excluded from the reckoning with words of trenchant emphasis." *Roberts* v. *New York City*, 295 U.S. 264, 283.

The *Roberts* case is of further interest because it involved a question as to the value to be placed on easements—in that instance, easements to operate on the public streets held by an elevated railroad company. The Court, having found that the company's franchise had become valueless because it had been long operating at a loss, concluded (p. 285) that the easements "had a worth that was merely nominal." In other words, the value of the easements was the value of the right to make an affirmative and profitable use of the property in the manner described by the grant; value was not to be measured by the injury

or deprivation which such use might entail for others.[1]

C. The erroneous view (R. 330) that the fee owner "destroyed the value of the fee," many years ago, by the conveyance of flowage easements to the power company apparently led the court below to believe that, if fee value were not awarded to the power company, the United States would get "something for nothing." The United States is not seeking a windfall. We are seeking, rather, to avoid two possibilities—that of paying the wrong person; that of paying twice. We submit that the fee values are in the fee owner and that the owner has been fairly and properly compensated, to her full satisfaction.

We have pointed out above that the right conveyed by the fee owner to the power company was one which respondent had no immediate capacity to enjoy, that the prospect of enjoyment was never more than remote, that it was at all times conditioned upon the prior grant of a federal license and that the prospect of fulfilling the condition had expired well before the proceeding in condemnation was instituted. In short, to say that a right of use destroys the value of the fee assumes not only that the use will be destructive, but it assumes further that the right can and will be put to prompt effect. The latter assumption is disproved by the facts of this case.

[1] For other cases holding that, where an easement has not proved productive, no damages, or merely nominal damages, are sustained on condemnation, see *Northern Pac. Ry. Co. v. North American Tel. Co.*, 230 Fed. 347, 354–359 (C.A. 8), and cases there cited. Original cost of the easement is not the test, see *United States* v. *Toronto Nav. Co.*, 338 U.S. 376, 403, but, if it were, respondent would be faced with its failure to show what was originally paid for the flowage easements.

We note additionally that the fact that the owner of a fee has already granted an easement to X is not ordinarily regarded as precluding him (at least, in the absence of a specific contractual undertaking to refrain) from granting a similar easement to Y and Z.[8] In all events, X can complain of interference by subsequent grantees of the fee owner only if he establishes that they are in fact impairing his active enjoyment of his right of use.[9] In the instant case, nothing valuable was taken from respondent when the United States obtained an easement from Mrs. Williams because respondent had never been able to exercise its right of use and was plainly in no position to do so in the future.[10]

A corollary of the proposition that respondent's rights had in practical effect expired before the date of condemnation is the proposition that the interest of the fee owner was substantially unimpaired at the

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[8] 3 Powell, *Real Property*, Sec. 417, p. 472; Sec. 420, p. 486; American Law Institute, *Restatement of Property* (1944) Sec. 493, com. d; Note, 133 A.L.R. 1200, 1201; *Pasadena* v. *California-Michigan Land & Water Co.*, 17 Cal. 2d 576, 110 P. 2d 983.

[9] *Harlow* v. *Lake Superior Iron Co.*, 36 Mich. 105, 119–120; *Brookshire Oil Co.* v. *Casmalia Etc. Co.*, 156 Cal. 211, 216–217, 103 Pac. 927, 929; Note, 133 A.L.R. 1200, 1203. See N.Y. Stat. (McKinney, 1959) Real Property Law, Sec. 346, as enacted by N.Y. Laws, 1958, c. 864.

[10] The fact that the power company was joined as a defendant in the condemnation proceeding does not, of course, give rise to an inference that it had an interest of substantial value. It is the Government's regular practice to join all parties who may assert claims of right in relation to the condemned property. Such joinder does not prejudice any claim or defense of the United States. *United States* v. *93,970 Acres*, 360 U.S. 328.

time of the taking and that the full measure of compensation owing was due to her. At most, the outstanding easement of the power company represented a cloud upon the title. To the limited extent that this cloud might have diminished the market value of the fee, the United States is not responsible. Where owners, by their own division of interests in a tract of land, have lessened the value of the whole, the United States is not required to pay more than the market value of the individual interests, even though the aggregate of payments may prove less than the amount which would have been paid if the whole had remained undivided. *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195; *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 76, 80; *Mayor and City Council of Baltimore* v. *United States*, 147 F. 2d 786, 789 (C.A. 4).

The bite of the decision below would be more apparent if the settlement with the fee owner had involved a payment, say, of $50,000 instead of one dollar. But the only fact of legal significance is that the United States has made a full settlement with the fee owner to the latter's complete satisfaction. See R. 37–38. The fortuitous circumstance that Mrs. Williams desired to convey a flowage easement, rather than a fee, to the United States and that she deemed one dollar adequate monetary consideration because she wished to enjoy the benefits of having an artificial lake upon her estate,[11] cannot enlarge the rights of

[11] The arrangement which the United States made with Mrs. Williams gives her the undoubted advantage of exclusive fee ownership of the shore.

others or confer upon them a right of compensation for more than the legal interests that they themselves possess. *United States* v. *Petty Motor Co.*, 327 U.S. 372, 376; *Messer* v. *United States*, 157 F. 2d 793, 795 (C.A. 5); *Southern California Fisherman's Ass'n* v. *United States*, 174 F. 2d 739, 740 (C.A. 9).

The irrelevance of fee value from the standpoint of the power company's right to compensation is also evident from consideration of the case which would be presented if the Government had proceeded by physical seizure (leaving injured parties to suit under the Tucker Act) rather than by declaration of taking. Certainly, whatever the procedure, the amount of compensation due the affected parties is the same. *Hurley* v. *Kincaid*, 285 U.S. 95, 104; *United States* v. *Dow*, 357 U.S. 13, 21. In a Tucker Act suit by the power company, claims of interference with agricultural or timber uses—uses of which the utility company could not avail itself—would certainly be excluded, for in such a case the burden would be on the company to demonstrate how *it* had been injured by the Government's flooding of the land.[12] The only interference with the *company's* interests would be with prospective flooding for power purposes, and that is precisely the value excluded by this Court's *Twin City* decision. The case here is no different.

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[12] The measure of compensation, of course, is loss to the owner, not gain to the taker. *United States* v. *Twin City Power Co.*, 350 U.S. 222, 228; *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 76, 80; *United States* v. *Miller*, 317 U.S. 369, 375. The owner has the burden of proving that loss. *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 273–274.

II. THERE WAS NO BASIS FOR THE AWARD OF "SEVERANCE DAMAGES."

In *United States* v. *Miller,* 317 U.S. 369, this Court stated the principle of severance damages as follows (p. 376): "If only a portion of a single tract is taken, the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract." See also *Bauman* v. *Ross,* 167 U.S. 548, 574; *Cole Investment Co.* v. *United States,* 258 F. 2d 203, 204–205 (C.A. 9). The law thus recognizes that taking part of an area may diminish the value of the part not taken, for example, by making the remainder too small for optimum use. In the case of condemnation of a fee, the total compensation, including severance damage, is determinable by ascertaining the value of what is left after the taking and deducting that amount from the value of the whole before the taking.

In this case, the district court affirmed the report of the commission which allowed $11,720 as "damages to the residue" (R. 102)—damages described by the court of appeals as "severance damages" (R. 336). But there is no tract which remains in the power company's hands after the taking. The court of appeals' decision, in granting compensation other than severance damages, proceeds on the premise that the Government ousted the power company of its easement over 1540 acres, representing the right to flood to an elevation of 321 feet. The court of appeals also held that compensation for the lands between that elevation and contour level 330, the height of the Government's described easement, would be payable to Mrs. Wil-

liams. It thus recognized that the power company's easement was a lesser easement than that acquired by the Government. It follows, we submit, that there is no subsisting or residual interest in the power company damaged by severance. It has suffered no loss.

The court below justified the severance damage award on the theory that the power company, acquiring an easement from Mrs. Williams, would have to pay her severance damage; therefore, it concluded, the United States must pay such damages to the power company. But Mrs. Williams has already been compensated. Her rights are not here involved and they cannot in any event enlarge those of respondent.

It is also settled that there is a right to severance damages only where there is unity of use as between the part taken and the residue. *E.g., Cole Investment Co.* v. *United States,* 258 F. 2d 203, 205 (C.A. 9); *United States* v. *Mills,* 237 F. 2d 401, 404 (C.A. 8); *Baetjer* v. *United States,* 143 F. 2d 391 (C.A. 1), certiorari denied, 323 U.S. 722; *Sharp* v. *United States,* 112 Fed. 893, 896 (C.A. 3), affirmed, 191 U.S. 341. In the instant case the only residue of any kind is the Falkland Estate which "has been used exclusively for the past twenty-five years or more as a conservation project," aiming at the preservation of "timber and the development and propagation of wildlife" (R. 160). Respondent has no interest in that use and has never participated in it.

The right, moreover, is restricted to tracts in one ownership. *United States* v. *Honolulu Plantation Co.,* 182 F. 2d 172, 175–176, 178–179 (C.A. 9), certiorari

denied, 340 U.S. 820;[13] *State* v. *Superior Court for Spokane County*, 10 Wash. 2d 362, 371, 116 P. 2d 752, 756; *McIntyre* v. *Board of County Comm'rs*, 168 Kan. 115, 118–121, 211 P. 2d 59, 63–64; *Conness* v. *Indiana, I. & I. R. Co.*, 193 Ill. 464, 470–471, 62 N.E. 221, 223; *Glendenning* v. *Stahley*, 173 Ind. 674, 683–684, 91 N.E. 234, 238; *Tillman* v. *Lewisberg & N. R. Co.*, 133 Tenn. 554, 182 S.W. 597; *Duggan* v. *State*, 214 Iowa 230, 233, 242 N.W. 98, 99. As shown by these cases, different interests, even when held by husband and wife, brother and sister, or parent and child, will not support a recovery of severance damages."[14]

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[13] The *Honolulu Plantation* case also expresses the view that the severance damage rule is applicable only "to condemnation of fee simple title of a tract * * *" (182 F. 2d at 175–176).

[14] Apart from the fact that the claim which respondent prosecuted covered but 1540 acres of a 7400-acre estate (R. 26, 28, 30–32, 53, 57, 70, 72, 75–77, 78, 330), it appears that substantial acreage embraced in the Government's taking was acquired by the Falkland Estate subsequent to any rights conveyed to the respondent (R. 160). Respondent could not on any theory be entitled to severance damages with respect to that acreage.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys.

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